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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM DEMAREST, Defendant and Appellant.	E034891 (Super.Ct.No. FBA006529) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Thomas D. Glasser, Judge. Affirmed.

Marleigh A. Kopas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Lynne G. McGinnis, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was charged with (1) transportation of a controlled substance on February 24, 2001 (count one); (2) possession for sale of a controlled substance on February 24, 2001 (count two); (3) possession of a controlled substance on February 28, 2001 (count three); and (4) manufacturing methamphetamine on February 28, 2001 (count four; hereafter, references to February 24 and February 28 will be to the year 2001). The People further alleged defendant had previously been convicted of possession of a controlled substance for sale and possession of methamphetamine components with intent to manufacture methamphetamine.

At the close of the prosecution case, the court granted defendant's motion pursuant to Penal Code section 1118.1 for acquittal on counts one and two, the February 24 counts. The jury later convicted defendant on counts three and four, the February 28 counts. The court found the prior conviction allegations for both counts were true. The court sentenced defendant to 13 years.

Defendant contends the jury improperly considered the evidence pertaining to the February 24 counts in convicting him of the February 28 counts. He also contends the imposition of the upper term for manufacturing methamphetamine violated *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403]. We affirm the judgment.

I

FACTS

A. *February 24 Counts (One and Two)*

About 12:20 p.m. on February 24, Sheriff's Deputy Schreiber stopped a white pickup truck in Yermo for speeding. Defendant was driving. There were two

passengers, a male and a female. The male identified himself as Carson Hodges, and the female identified herself as Michelle Garcia. Immediately after the stop, Parole Agent McKellar, who had been following Schreiber, arrived at the scene. McKellar removed Hodges and Garcia from the truck, and after about five or 10 minutes advised Schreiber to seat them in the back of his patrol car.

Defendant consented to a search of the truck. Deputy Bloomingdale arrived and searched a toolbox in the back of the truck. He took from the toolbox a green bag that said "Denali" on it. Defendant said the property in the toolbox was his but that property belonging to his passengers was in the cab of the truck. Bloomingdale told Schreiber to arrest defendant. Schreiber took Hodges and Garcia to the Barstow jail and booked them into the jail. Bloomingdale transported defendant.

Later, Schreiber rejoined Bloomingdale at the sheriff's station. Bloomingdale went through the green Denali bag. He showed Schreiber two baggies containing a white residue. However, Schreiber did not actually see Bloomingdale take any items from the bag, and Schreiber himself had not seen the green bag when he searched the toolbox during the traffic stop.

Bloomingdale died in March 2001 and was not available to testify at trial.

B. *February 28 Counts (Three and Four)*

In the late morning on February 27, 2001, Ranger Gebicke of the National Park Service attempted to drive to the New Trail Mine site in the Mojave National Preserve. He found the only access road blocked by a padlocked gate. The lock appeared to be brand new. Neither the gate nor the lock had been there previously.

There were two cabins, side by side, and a shed at the mine site. Gebicke walked to the site and found the left cabin locked with a padlock. The right cabin was not locked, but the door was blocked from inside. The cabins had not been locked previously. There were fresh tracks in the area.

The right cabin contained a bed and food and appeared to be inhabited. Gebicke found fresh trash in a burn barrel outside the cabins. The trash was not wet, even though it was sprinkling. In the barrel was a Winston Tire receipt from 1999, bearing the name "Bill Demarest."

The next day, February 28, Gebicke returned to the mine site in the early afternoon, accompanied by Ranger Duncan. About one-quarter mile before they got to the gate, they encountered a Ford truck coming the other way, occupied by two males and two females.

Defendant was driving the truck. He said the group was coming from the mine site and had gone in the night before, to camp. He also said he had been to the site 10 to 14 days earlier. According to defendant, the site belonged to an old neighbor of his, Sidney Hodges of Yermo.

Defendant consented to a search of the truck. In the back of the truck were two ice chests Gebicke had seen in the right cabin on the previous day. Duncan obtained a key to the gate from defendant, and the rangers drove to the cabins. The only tracks on the road were from the truck defendant was driving.

The right cabin had been cleaned, and the camping gear was gone. The key to the gate opened the lock to the left cabin, but entry was barred from inside. The rangers kicked the door open. Inside, they found a table covered with plastic. There were

containers on the table, some of which had chemical formulas written on them. There was a wood stove, which was still warm. The burn barrel outside had been lit and was still burning. There was a stain on the ground which looked like red phosphorus, an essential chemical for manufacturing methamphetamine.

The rangers suspected there might be methamphetamine manufacturing occurring at the site. They contacted the sheriff's department. When the deputies arrived, it was late in the day. They confirmed the site contained a methamphetamine lab. After the deputies left, the rangers stayed at the site all night to maintain security. No one else came to the site.

That same evening, officers served a search warrant at defendant's residence in Yermo. Defendant lived at the residence with Margaurite (Peggy) Lepker, his fiancée. Only Lepker was home when the officers conducted the search.

In the master bedroom, the officers found a wooden box on a dresser next to the bed. The box contained a bag of marijuana and a small bag containing a usable quantity of methamphetamine. According to Lepker, the marijuana was hers. She said she was aware of the methamphetamine, but it was not hers. She also stated no one else had ever lived at the residence with her and defendant.

Sheriff's deputies returned to the mine site on March 1, 2001, to conduct a search. In and around the left cabin, they found various items consistent with the operation of a methamphetamine lab. They concluded methamphetamine manufacturing was going on at the site and that a "cook" was in progress. Laboratory testing confirmed the presence of methamphetamine or its precursors in various items found in and around the left cabin. The investigating officer concluded that in view of the quantities and the sizes of the

containers involved, the manufacturing was a large-scale operation that generally would be conducted by more than one person.

C. *Defense*

Carson Hodges testified he owned the property with the cabins. When the officers stopped the truck on February 24, they arrested Hodges for violating parole. Hodges asked defendant to take his keys and go up to his cabin to pick up his tools, sleeping bags, and other property. Hodges denied owning any of the items connected with the methamphetamine manufacturing.

Hodges stated he put the locks on the gate and cabin because there had been problems with people breaking in.

II

DISCUSSION

A. *Denial of Motion for Mistrial*

On May 8, 2003, after the prosecution had presented its case, defendant moved pursuant to Penal Code section 1118.1 for acquittal on counts one and two. The court granted the motion. It ruled that because Deputy Bloomingdale was deceased, all the prosecution could show was that the methamphetamine was taken from somewhere in the truck, not that it was taken from an area attributable to defendant.

Defendant then moved for a mistrial on counts three and four, on the ground the admission of the evidence on counts one and two was irreparably prejudicial. The court denied the motion but stated it would give CALJIC No. 17.46.

When the jury returned, the court instructed: "Ladies and gentlemen of the jury and alternate, the issue of the guilt of the defendant as to Counts 1 and 2 is no longer

before you. Do not consider this fact for any purpose. It is not relevant to whether the defendant is guilty or not guilty of any of the remaining counts. [¶] Further, do not conclude from the fact that this instruction has been given that I am expressing any opinion as to the facts or whether the defendant is guilty or not guilty of any other crimes. [¶] And you may not consider . . . , ladies and gentlemen, the evidence that was presented pertaining to Counts 1 and 2, in your determination of the remaining counts."

Defendant contends the court committed reversible error in denying a mistrial.

1. *Standard of review*

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 372.) Whether in a given case the erroneous admission of evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury "rests in the sound discretion of the trial court. [Citation.] '" . . . Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." [Citation.]'" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581.)

2. *Analysis*

Defendant contends the admission of the evidence concerning counts one and two was incurably prejudicial because it caused the jury to learn: (1) that the police stopped defendant on February 24 and his passengers were handcuffed and booked into jail, creating prejudice in the form of "guilt by association"; (2) that defendant claimed ownership of the property in the toolbox, and that the Denali bag was found therein, after

which Bloomingdale instructed that defendant be arrested; and (3) that the evidence custodian at the police station received methamphetamine, cash, and drug paraphernalia, all linked only to defendant.

Defendant's "guilt by association" argument is not persuasive. The evidence on the February 24 counts did establish a connection between defendant and Hodges. However, the evidence on count four, the February 28 manufacturing charge, would have done so in any event. That evidence established defendant had visited Hodges's cabin site at least twice and had a key to the gate and the left cabin. Hodges testified he had given his keys to defendant. The connection between defendant and Hodges was inescapable, even apart from the February 24 evidence.

Similarly, while the February 24 evidence showed Hodges was taken into custody following the traffic stop, Hodges's connection with criminality was established by the count four evidence. That evidence showed Hodges owned a site at which methamphetamine manufacturing was occurring. In addition, Hodges admitted he had two prior felony convictions.

Though this evidence did not come in until the defense case, it would be fanciful to suggest the defense would not have called Hodges to testify had the February 24 evidence not been a part of the prosecution's case. Hodges provided defendant's only defense to count four -- that he was at the site on February 28 not to manufacture methamphetamine, but to pick up Hodges's property at Hodges's request. If defendant had not called Hodges, there would have been no explanation for why he was at the site while a methamphetamine "cook" was in progress.

The court had been advised before trial that Hodges would be called as a defense witness. The court also knew Hodges would claim ownership of the cabin site. Hodges testified at an in limine hearing to that effect. Accordingly, it was not an abuse of discretion for the court to surmise that in view of the count four evidence and Hodges's probable testimony, the February 24 evidence showing Hodges had been taken into custody did not create any appreciable prejudice that would not have existed anyway.

The evidence connecting defendant and Garcia also did not create any significant additional prejudice. Defendant's connection with criminality would have been established in any event by the evidence of his connection with Hodges and Hodges's connection with the manufacturing site. The additional fact that another person in the truck on February 24 had been taken into custody added no potential prejudice.

Defendant's additional claims of prejudice are that the February 24 evidence showed defendant claimed the property in the toolbox, where the Denali bag was located, and that the evidence custodian at the police station received methamphetamine, cash, and drug paraphernalia, all linked only to defendant. These claims are not persuasive either. Defendant's connection with methamphetamine would have been shown anyway by the count three evidence that he had some in his residence and by the count four evidence showing defendant had been at the cabin site while methamphetamine was being manufactured.

Moreover, the February 24 evidence did not establish a solid connection between defendant and the methamphetamine or paraphernalia found in the truck. That, in fact, was the reason the court granted the acquittal motion -- the prosecution could not show the contraband came from an area attributable to defendant. Schreiber did not see the

Denali bag in the toolbox, nor did he see Bloomingdale take methamphetamine out of the bag. The fact contraband items were taken into evidence at the police station did not show they had been in defendant's possession or control. The court reasonably could conclude this evidence was not incurably prejudicial.

Defendant also contends the court's admonition not to consider the evidence on counts one and two was ineffective, because during deliberations the jury asked a question about the February 24 traffic stop, indicating it was considering the evidence on counts one and two despite the admonition. (See discussion, part II.B., *post*.)

Defendant's contention that the admonition proved ineffective in light of later events is not germane to whether the court abused its discretion in denying a mistrial. An appellate court reviewing a discretionary ruling must "review the trial court's ruling on the basis of the record of the proceedings before it at the time the ruling was made . . . ." (*People v. Griffin* (2004) 33 Cal.4th 536, 574.) Thus, in reviewing the denial of a severance motion, a court must "examine the record before the trial court at the time of its ruling. . . ." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; accord, *People v. Catlin* (2001) 26 Cal.4th 81, 110-111; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 90 [same rule applies in reviewing denial of motion for acquittal].)

A motion for severance is directly analogous to defendant's mistrial motion in this case. Both raise the issue whether the inclusion of certain charges in the case is likely to irreparably prejudice the jury in its determination of other charges. (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1120; accord, *People v. Catlin*, *supra*, 26 Cal.4th 81, 110.) Accordingly, the approach applied in reviewing the denial of a severance motion,

examining the record before the trial court at the time of its ruling, applies equally in this case.

At the time it denied the mistrial motion, the court could not reasonably have foreseen that the jury might consider the February 24 evidence notwithstanding the admonition. Our Supreme Court numerous times has stated: "'The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1218; accord, *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) The presumption applies fully to situations in which a court instructs a jury not to consider certain counts in deciding others.

In *People v. Cuevas* (1971) 16 Cal.App.3d 245, for example, the defendant was charged with three counts alleging possession and transportation of amphetamine and three additional counts alleging possession of morphine and narcotic paraphernalia. During trial, the prosecution dismissed the morphine and paraphernalia counts after the jury had heard considerable evidence on those counts. The judge struck the testimony pertaining to the dismissed counts and admonished the jury to disregard it. Despite the fact that both the dismissed counts and the remaining counts were based on possession of illegal drugs, the Court of Appeal found no prejudicial error, stating: "It must be presumed that the jury followed the admonition and the instruction. No abuse of discretion has been shown." (*Id*. at p. 251.)

In *People v. Arjon* (2004) 119 Cal.App.4th 185, the defendant was charged with child molestation and kidnapping the molestation victims. At the end of the prosecution

case, the court dismissed the kidnapping counts pursuant to Penal Code section 1118.1. The defendant argued the kidnapping counts should have been dismissed before trial pursuant to Penal Code section 995. Rejecting the defendant's contention that prejudicial error had occurred, the court said: "[T]he jury was instructed . . . that it must not consider, for any purpose, the fact that the kidnapping counts were dismissed. We presume they understood and followed these instructions. [Citation]." (*Arjon*, at p. 194.)

Based on these decisions, the court here reasonably could presume, at the time it granted the motion for acquittal, that the jury would understand and follow its admonition not to consider the evidence on the discharged counts. The court did not abuse its discretion in denying a mistrial.

B. *Denial of Motion for New Trial*

Defendant moved for a new trial on July 11, 2003. He argued the jury committed misconduct by continuing to consider the evidence relating to counts one and two after the court had granted acquittal on those counts and admonished the jury to disregard the evidence on them. Defendant supported his motion with (1) testimony of his fiancée, Peggy Lepker, that an alternate juror made a statement about the acquitted counts during a recess, and (2) a note that the jury sent to the court during deliberations, requesting further information about the February 24 traffic stop. The court denied the motion. Defendant claims this was error.

1. *Applicable legal principles and standard of review*

"A juror's misconduct raises a presumption of prejudice, which may be rebutted by proof no prejudice actually resulted. [Citations.]" (*In re Malone* (1996) 12 Cal.4th 935, 963.) " . . . 'Any presumption of prejudice is rebutted, and the verdict will not be

disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 196, quoting *In re Hamilton* (1999) 20 Cal.4th 273, 296.)

The prosecution is not required to produce affirmative evidence that no prejudice occurred in order to rebut the presumption. "The presumption of prejudice may be rebutted by an affirmative evidentiary showing '*or* by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.' [Citations.]" (*In re Carpenter* (1995) 9 Cal.4th 634, 657.)

In determining whether misconduct created a substantial likelihood of actual bias, an appellate court must "'accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]' [Citation.]" (*People v. Ault* (2004) 33 Cal.4th 1250, 1263.)

The substantial likelihood standard "is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.] . . . ' . . . If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.' [Citation.]" (*In re Hamilton*, *supra*, 20 Cal.4th 273, 296.)

2. *Analysis*

a. *Alternate juror's statement*

With his new trial motion, defendant submitted a declaration of Lepker stating: "1. On May 13, 2003, I was in the hall at the Barstow Courthouse; [¶] 2. The jury in the William Demerest case were also in the hall; [¶] 3. While in the hall, I heard the alternate juror, who is a San Bernardino County Sheriff Posse member, tell the other jurors that the reason they acquitted William Demerest on counts one and two was because they didn't catch him doing it."

At the August 25, 2003 hearing on the new trial motion, Lepker testified that at some point she was in the hall when at least eight or 10 jurors were there. Some of the jurors were talking about the fact that counts one and two had been dismissed. A male alternate juror who was talking to two male jurors made the comment that it didn't necessarily mean defendant was innocent, just that he wasn't caught red-handed. None of the other jurors was speaking when the alternate made the comment. This probably occurred on May 8, 2003, not May 13 as Lepker had stated in her declaration.

Lepker admitted she had no personal knowledge whether the alternate juror was a member of the reserve sheriff's posse.

Lepker further testified she had been defendant's fiancée since 1996. She and defendant were planning to marry as soon as they could. They had combined their finances, and defendant used money from both of them to pay for his defense.

The court ruled on the new trial motion on September 10, 2003. It found the jurors who rendered the verdict did not commit misconduct by discussing counts one and two in the hall during deliberations. It noted that the alternate never sat on the jury.

Lepker's references to other jurors discussing the acquitted counts were too vague to show misconduct had occurred, and her credibility was doubtful. Even if the alternate's statement were enough to create a presumption of prejudice, the presumption was rebutted by the above facts, plus the fact the jury had been instructed not to consider the acquitted counts.

The trial court's determination that Lepker's credibility was doubtful was supported by substantial evidence. Not only was Lepker defendant's longtime fiancée, but she also signed a declaration under penalty of perjury that she later admitted misstated the date of the alleged hallway statement by five days. In fact, it was questionable whether she even reviewed the declaration before signing it, since the document apparently spelled defendant's name wrong.[1] She also had hearing problems that came and went and thus could have been affecting her ability to hear what was said in the hallway.

In addition, the court correctly determined Lepker's claim that all the jurors were "discussing" the fact counts one and two had been dismissed was too vague to constitute credible evidence of misconduct. Lepker never stated which juror or jurors said anything or what was allegedly said. Given Lepker's clear bias in favor of defendant, the court was justified in concluding no showing of misconduct had been made.

Moreover, even if there had been credible evidence of misconduct, the court properly concluded any presumption of prejudice was rebutted by the record as a whole.

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[1] The declaration spelled defendant's name "Demerest." However, it appears "Demarest" is the actual spelling.

"[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.]" (*In re Carpenter*, *supra*, 9 Cal.4th 634, 653.)

The statement Lepker claimed the alternate made was not inherently prejudicial. It was a statement of opinion, not a reference to any extraneous factual material regarding the case. There was nothing in the record to indicate any trial juror believed, shared, or was influenced by the alternate's opinion.

Moreover, the alternate's comment was not literally inaccurate or misleading. It stated only that the acquittal did not prove defendant was innocent. This was an accurate statement, as the jury would have gleaned anyway from the instruction it received on the burden of proof: "A defendant in a criminal action is presumed to be innocent unless the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. [¶] This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." The necessary corollary to this principle is that if a defendant is found not guilty, it means the People failed to overcome the presumption of innocence, not that the defendant was proven innocent.

Nor was the alternate's statement, in the context of the trial as a whole, likely to have created actual bias in any juror. The evidence supporting counts three and four was strong. Count three was supported by the presence of methamphetamine in a box on a dresser next to the only bed in the master bedroom, a bed large enough to accommodate two persons. Lepker said she knew of the methamphetamine, but it was not hers. No one other than Lepker and defendant lived at the residence. The inference was virtually inescapable that the methamphetamine belonged to defendant.

Count four was supported by the facts defendant had a key to the locked gate and the cabin containing the methamphetamine lab; said he had been at the site on February 27 and 28, 2001; and was driving away from the site when a "cook" was in progress. A receipt bearing his name was also at the site on February 27 and apparently had not been there long. No one else was observed at the site either day. Hodges testified the lab equipment was not his. That left defendant as the logical owner and/or operator of the equipment.

For these reasons, we find no substantial likelihood that any of the jurors was actually biased against defendant on account of the alternate's alleged remark. Accordingly, any presumption of prejudice raised by the remark was rebutted. (*In re Carpenter*, *supra*, 9 Cal.4th 634, 657.)

b. *Jury note*

The jury began deliberations on May 13, 2003. On May 14, 2003, it sent the court this note: "Would like to hear about the stop on the 24th of Feb. 2001, and about the denali [*sic*] bag and the check or warrant at house and jury instruction."

After discussing the matter with the parties, the court instructed the jury: "Part of your inquiry was: We would like to hear about the stop on the 24th of February 2001 and about the Denali bag. [¶] You are to disregard all evidence regarding Counts 1 and 2, other than that which pertains to witness Carson Hodges. [¶] Now, on May 8th, '03, when I indicated to you that the guilt or innocence of the defendant, with respect to Counts 1 and 2, was no longer before you, I told you that you may not consider the evidence that pertains to those counts. [¶] And, so once again, I will refine that admonition to you, and repeat it to you again. Disregard all of the evidence regarding Counts 1 and 2, other than that which pertains to witness Carson Hodges."

About two hours later, the jury convicted defendant of counts three and four.

At the hearing on the new trial motion, defense counsel argued the note showed the jury had committed misconduct by considering evidence, such as the Denali bag, that pertained only to counts one and two in violation of the court's instruction. The court found no misconduct. In the court's view, when the jury was instructed in response to their note on May 14, 2003, it finally "hit home" to them that they were not supposed to consider the evidence on the acquitted counts. The relatively quick verdict after that instruction suggested the jury had had questions about counts one and two that were keeping them from reaching a verdict. Once the jury understood it could not consider the evidence on those counts, it readily reached a verdict.

Defendant argues the court erred, because the final instruction not to consider the evidence on counts one and two could not have been effective. He contends this is so because the jury had already shown its propensity to ignore such an instruction by disregarding the same instruction when it was given on two previous occasions.

The record does not support defendant's assertion. When the court gave its final instruction in response to the jury note, the jury had *not* been instructed twice not to consider the February 24 evidence as defendant claims. The court did so instruct the jury just after it granted the acquittal motion, on May 8, 2003. When it instructed at the end of the case on May 13, 2003, however, the court told the jury: "The issue of the guilt of the defendant as to Counts 1 and 2 is no longer before you. Do not consider this fact for any purpose. It is not relevant to whether the defendant is guilty or not guilty of either of the remaining counts. [¶] Further, do not conclude from the fact that this instruction has been given that I am expressing any opinion as to the facts or whether the defendant is guilty or not guilty of any other crimes."

Notably, neither in the May 13 instruction as read nor in the written copy of it that was provided to the jury did the court repeat the *additional* admonition it had given on May 8: "And you may not consider . . . , ladies and gentlemen, the evidence that was presented pertaining to Counts 1 and 2, in your determination of the remaining counts." In other words, the court on May 13 told the jurors the issue of defendant's *guilt* on counts one and two was not before them, but it did not explicitly admonish them not to consider the *evidence* on those counts as it had done on May 8.

This fact provides the only persuasive explanation for the jury's apparent failure to understand, at the time it sent the May 14, 2003, note, that it could no longer consider the February 24 traffic stop or the Denali bag. The jury had been instructed not to consider that evidence on May 8 but had not been so instructed at the end of the trial on May 13. In the five-day interim, the jury evidently forgot the substance of the May 8 instruction -- there is no indication they were given a copy of that instruction -- and therefore failed to

note the disparity between that instruction and the May 13 instruction, as the court and counsel apparently did as well.

When the court cleared up the misunderstanding by repeating the admonition from the May 8 instruction, the jury promptly reached its verdict. The logical inference is that, as the court suggested, the jurors had questions about counts one and two that were keeping them from reaching a verdict. Once they understood those questions were no longer relevant, they could readily decide counts three and four.

Defendant's proposed alternative explanation -- that the jury's May 14 note indicated it was still considering the February 24 *even though* it knew it was not supposed to do so, and therefore it must have disregarded the May 14 instruction too -- flies in the face of the presumption, discussed *ante*, that jurors follow instructions. It is not reasonable to accept that explanation when the alternative one, that the jury was simply confused and not disobedient when it sent the note, satisfactorily explains the May 14 events without requiring us to assume the jury deliberately ignored what it had by then been told two times.

It is a well-recognized principle of law that a deficiency in an instruction can be cured by another instruction. "'"The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole."' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; see also *People v. Burgener* (1986) 41 Cal.3d 505, 539, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743.) Here, the jury's apparent confusion as to whether it could consider the February 24 evidence was resolved by the May 14, 2003, instruction in response to the note. We are unaware of any authority suggesting that a jury's temporary misunderstanding concerning

the permissible use of evidence is misconduct or raises a presumption of prejudice. The trial court's finding that no misconduct occurred is supported by substantial evidence.[2]

C. *Upper Term*

At the sentencing hearing on October 15, 2003, the court selected count four, manufacturing methamphetamine, as the principal count. The court found one mitigating factor, that defendant's prior performance on parole was satisfactory. As aggravating factors, it found (1) the crime was carried out in a manner indicating planning and sophistication or professionalism; (2) the methamphetamine lab was a large-scale operation; and (3) defendant would receive a concurrent sentence for another crime, count three, for which he could have been sentenced consecutively. Accordingly, the court imposed the upper term of seven years for the manufacturing count.

Defendant contends the upper term violated *Blakely v. Washington*, *supra*, 542 U.S. __, because the court supported its sentencing choice with factual findings that, under *Blakely*, could only be made by a jury. In *People v. Wagener* (2004) 123 Cal.App.4th 424, 437, Division One of this district held that a trial court's imposition of an upper term does not violate *Blakely* even if it is based on factual findings made solely by the court. In *People v. Picado* (2004) 123 Cal.App.4th 1216, Division Five of the

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[2] Defendant contends that even if the alleged errors on which he bases this appeal were not prejudicial in isolation, their cumulative effect was to deprive him of a fair trial. We have concluded that there was no error in denying a mistrial and that the alleged jury misconduct either was not misconduct or did not indicate any substantial likelihood of actual bias. We have considered all of the alleged errors together with one another and conclude they were not cumulatively prejudicial.

First District reached the same conclusion. We concur in the reasoning and holding of those decisions and, therefore, reject defendant's sentencing challenge.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.